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No. 88-293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Community for Creative Non-Violence, et al.
Petitioners,

-against-

James Earl Reid
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief, Amicus Curiae, of the American Intellectual Property Law Association

American Intellectual Property
Law Association
2001 Jefferson Davis Highway
Arlington, Virginia 22202

Arthur J. Levine
(Counsel of Record)
Richard C. Wilder
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-6850

William L. LaFuze
VINSON & ELKINS
2900 First City Tower
Houston, Texas 77002
(713) 651-2595

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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INTEREST OF THE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

The American Intellectual Property Law Association, Inc. ("AIPLA") is a national bar association of more than 5400 members who are admitted to the bars of many of the different states and are engaged in the practice of copyright, patent, trademark, licensing, trade secret, and other laws protecting intellectual property rights. The AIPLA membership includes attorneys in private, corporate, and government practice; lawyers associated with universities and small and large businesses; and lawyers active in both the domestic and international transfer of technology and licensing.

The AIPLA has no views on the private interests of the parties to this action, but is deeply concerned about an issue of public importance relating to the decision of the United States Court of Appeals for the District of Columbia from which review is sought. The sole interest of the AIPLA here is to promote clarity, certainty, and uniformity in the law of copyright, which will benefit members of the bar, the judiciary, and, most importantly, the public.

The AIPLA believes that creators of copyrightable works as well as the copyright system itself will best be served if the decision below of the District of Columbia Circuit is affirmed so that all interested parties who create or use copyrighted works can resolve issues of authorship and ownership of copyright in such works fairly and with certainty.

SUMMARY OF THE ARGUMENT

Article I, § 8 of the Constitution empowers Congress to enact laws to

> promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . .

Pursuant to that power, Congress enacted the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. (1982) (the "1976 Act").

In order to be the subject matter of copyright under the 1976 Act, a work must be original, a work of "authorship", and must be fixed in a tangible medium of expression. 17 U.S.C. § 102. Ownership of copyright in a work vests initially in the author or authors of the work. 17 U.S.C. § 201. The statute does not define "author" or "authorship" but this Court has defined an "author" in the Constitutional sense as "[h]e to whom anything owes its origin; originator; maker; one who completes a work of science or literature." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

The law creates a fiction of sorts in section 201(b) by providing that

> [i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title . . .

A "work made for hire" is specifically defined in section 101 of the 1976 Act as including two separate categories of works: a work prepared by an employee within the scope of his or her employment and, under certain prescribed circumstances, a work specially ordered or commissioned.[1] The 1976 Act fails to define "employee" and "employer." Because the statute itself provides no definitional assistance as to the appropriate indicia of an employer-employee relationship, one must refer to the legislative history to obtain such guidance.

The legislative history of the 1976 Act is thoroughly reviewed and analyzed in *Dumas v. Gommerman*, No. 87-6542 (9th Cir. January 13, 1989). As discussed there, during the debates that led up to the 1976 Act, interested parties came to a compromise in 1965 that resulted in the definition of "work made for hire" presently found in 17 U.S.C. § 101. *Dumas*, slip op. at 15. Briefly, the compromise was that authors would be granted termination rights in return for which publishers were accorded the status of "author" in only two situations. First, for works created by "employees" in the scope of their employment; second, for specifically enumerated categories of works created on commission when the parties agree that the work is to one made for hire. *Id.*, slip op. at 21-22. It was understood by all parties to the compromise that "em-

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[1] 17 U.S.C. § 101 of the 1976 Act defines a "work made for hire" as:

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . .

ployee" was to be limited to "regular, salaried" employees. *Id.*, slip op. at 19.[2]

A decision that a section 101 "employee" is a regular, salaried employee would affirm a regime of copyright authorship and ownership that is eminently fair, workable, and predictable. If the *Dumas* decision is followed, section 101 and 201 of the 1976 Act can be applied prior to the creation of the copyrighted work and at a time when, if necessary, the assignment of rights can be negotiated. If the person creating the work is a regular, salaried employee, and the work is prepared within the scope of his or her employment, ownership of the copyright in the work generally can be determined prior to the creation of the work because the employer is considered the "author" of the work under section 201(b).

If the person is not a regular, salaried employee, but is an independent contractor, then the second subdivision of the definition of "work made for hire" of section 101 may apply. If the work prepared by the independent contractor is one of the nine enumerated types and the parties expressly agree in writing that the work is to be considered as a work for hire, then the work will be a work made for hire. This is true because, under section 201(b), the "person for whom the work was prepared is considered the author . . .", and therefore the owner of the work is the person who hired the independent contractor.

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[2] While *Dumas* does hold that an "employee" under the first subdivision of section 101 is a "regular, salaried" employee, it does recognize that there may be ambiguous relationships and allows that relevant factors may be looked to to determine if the relationship is one of regular, salaried employment. *Dumas*, slip op. at 37-38.

The last possibility is that the person preparing a work is not a regular, salaried employee and either (1) the work is not one of those enumerated in part two of the definition or (2) the work is an enumerated work, but there is no written agreement between the parties to consider the work one created for hire. In such a case, the person to whom the work owes its origin is and remains the author. Under those circumstances, ownership of the work can be transferred by virtue of section 201(d) to the person who commissioned the author to prepare the work.

In the present case, the Community for Creative Non-Violence ("CCNV") commissioned James Earl Reid ("Reid") to prepare a work - a sculpture of three human figures and a shopping cart - entitled "Third World America." Reid was neither a regular, salaried employee of CCNV, nor was the work included in one of the categories of works enumerated in part two of the section 101 definition of "work made for hire." There was, moreover, no agreement, written or otherwise, concerning the status of the work as one made for hire. The court below was correct, therefore, in deciding that under such circumstances, CCNV was not an "author" by virtue of the "work for hire" provisions of the 1976 Act. The court partly erred, however, in its rationale for that decision. By injecting principles of agency law into a determination of whether a work created on special order or commission can be treated as the work of an "employee" within the first subdivision of section 101, the court upset the structure of the 1976 Act. We believe that the decision of the Ninth Circuit in *Dumas* represents the correct construction of the 1976 Act.

ARGUMENT

I. THE HOLDING BELOW IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE 1976 ACT

The legislative history of the 1976 Act relating to the "work for hire" doctrine can only be understood in the context of the Copyright Act of 1909, 17 U.S.C. §§ 1, et seq. (repealed 1976) (the "1909 Act") and the cases interpreting it. Once the parallel evolution of the legislative history of the 1976 Act and the judicial history of the 1909 Act are set side-by-side, it is clear that Congress intended an "employee" under section 101 of the 1976 Act to be a regular, salaried employee.

A. Case Law Developments Prior To 1966 Demonstrate "Work For Hire" Provisions of the 1909 Act Only Included Salaried Employees

The 1909 Act, the precursor to the present 1976 Act, provided in section 26 that "the word 'author' shall include an employer in the case of works made for hire." The 1909 Act did not further define "works made for hire." As of 1960, it was understood, however, that

> [t]he statutory concept of employment for hire is based on the specific contractual relationship between employer and employee. The courts have not given a definition of that relationship which will cover all situations that may come up, but all the cases have involved salaried employees who received either a fixed salary or a minimum salary plus commission. . . *Hence, it may be concluded that section 26 refers only to works made by salaried employees in the regular course of their employment.*

B. Varmer, *Works Made for Hire and on Commission*, Studies Prepared for the Copyright Office, Reprinted by the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. 127, 130 (Comm. Print 1960)(emphasis added)("Varmer Study").

Early cases involving the status of specially ordered or commissioned works under the 1909 Act prior to 1966 often involved the ownership of copyright in photographs. These cases did not hold that the sitter was the "employer" of the photographer and, therefore, "author" of the work. Instead, they merely stated a presumption, based on the common law, that where a person commissions a photograph to be taken, the commissioning party is entitled to rights in the photograph at least as between that person and the photographer. The possibility was left open that as between the photographer and third parties the photographer would own the rights. *See, e.g., Lumiere v. Pathe Exch.*, 275 F. 428 (2d Cir. 1921); *Lumiere v. Robertson-Cole Distrib. Corp.*, 280 F. 550 (2d Cir.), *cert. denied*, 259 U.S. 583 (1922).

The common law was synthesized in *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940), where the court stated:

> If [an artist] is solicited by a patron to execute a commission for pay, the presumption should be indulged that the patron desires to control the publication of copies and that the artist consents that he may, unless by the terms of the contract, express or implicit, the artist has reserved the copyright

> to himself. Such a presumption must rest on the supposed intention of the parties. . .

Thus, as of the date of the decision in the *Yardley* case, courts limited the applicability of section 26 of the 1909 Act to works prepared by regular, salaried employees in the regular course of their employment. Works created on commission were not treated as works for hire, but it was "presumed that the copyrights were *assigned* to the patron under the commission contract; there was nothing in them about 'work for hire.'" *Easter Seal Soc., Inc. v. Playboy Enters.*, 815 F.2d 323, 325 (5th Cir. 1987), *cert. denied*, ___U.S. ___ , 108 S.Ct. 1280 (1988)(emphasis in original).

B. The Legislative History of the 1976 Act

The "work for hire" doctrine was a major issue of discussion and debate during the lengthy revision process of the 1909 Act.[3]

At the outset of the revision process in 1961, the Register of Copyrights proposed that copyright ownership, but not authorship, of works created by employees within the scope of their employment vest automatically in the employer.[4] Such a result, however, was not acceptable to publishers because they believed that being considered an "owner" rather than an "author" of a work would adversely affect their rights in foreign jurisdictions.[5]

[3] "The status of works prepared on special order or commission was a major issue in the development of the definition of 'works made for hire' in section 101, which has undergone extensive revision during the legislative process." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., p. 121 (1976). An excellent review of the legislative history of the "work for hire" provisions of the 1976 Act is found in Patry, W.F., *Latman's the Copyright Law*, 117-125 (6th Ed. 1986).

[4] *See*, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 87 (Comm. Print 1961).

The Register of Copyrights accepted these concerns and in the preliminary draft of the Copyright Law presented to Congress by the Copyright Office on July 14, 1964, provided in section 14(b) that "[i]n the case of a work made for hire, the employer shall . . . be considered the author. . ." Copyright Law Revision Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 15, September, 1964 ("Copyright Law Revision Part 3"). A footnote to section 14(b) of the Draft Act defined a "work made for hire" as a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." Copyright Law Revision Part 3 at 15.

Although the debate continued through the legislative process as to whether works made on special order or commission should be included in the definition of work made for hire and if so, which works and on what terms, there was never any doubt expressed by the participants in the process of revising the U.S. Copyright Law as to the definition of "employee."[6] For example, the representative of the

[5] *See, Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1490, n.7 (D.C. Cir.), *cert. granted*, ___U.S. ___ , 109 S.Ct. 362 (1988).

[6] Statements made by participants in the process of revising the U.S. Copyright Law are highly relevant here because "[m]uch of the [1976] Act can be seen as a virtual contract between

American Book Publishers Council recast the proposed definition of "works made for hire" in the following terms:

> "[W]orks for hire" - in which copyright is by law owned by the employer - would be redefined to include only work done by a salaried employee in the scope of his regular duties and would exclude works made on special order or commission.

Statement submitted by the American Book Publishers Council to the Register of Copyrights in November 1963, reprinted in Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess. 250 (Comm. Print 1964)("Copyright Law Revision Part 4")[7]

creators and marketers of copyrighted materials. Many of the [1976] Act's provisions have considerable impact on these two interest groups without any broader effect beyond. The work for hire provisions are in this mold. In interpreting them, we quite properly are concerned with what the private interest groups, the negotiators, thought the terms meant when they negotiated and agreed to them. Congress's intent clearly was to embody in the [1976] Act the negotiated compromises. We must be careful not to distort the bargain reached after so many years of negotiation and compromise." *Dumas*, slip op. at 16-17.

[7] *See also*, comments of Julian T. Abeles, representing Music Publishers' Protective Association, Inc.: "[A] motion picture company would employ a man, and give him three months to write a script. That would be a work made on special order or commission, and therefore it would not be for hire." Part 4, p. 259, and comments of E. Gabriel Perle, representing Time, Inc.: "Where you get an outside entity and you ask them to create a work for hire, and it's the express intention of all the parties

As explained earlier in section I.A., this understanding as to the proper definition of the term "employee" was, prior to the decision in *Brattleboro Publishing Co. v. Winmill Publishing Co.*, 369 F.2d 565 (2d Cir. 1966), entirely consistent with the definition established by the courts construing section 26 of the 1909 Act.[8]

Having agreed to a definition of the term "employee" in the "work for hire" provisions, the publishers then endeavored to expand the definition of "work made for hire" to include commissioned works. For example, The American Book Publishers Council, Inc. and the American Textbook Publishers Institute proposed that a "work made for hire" be defined as:

> (a) a work created by an employee within the scope of his employment; [or]
>
> (b) a work created on special order or commission if the parties so agree in writing.

Copyright Law Revision Part 4 at 274.

This approach was adopted by the National Audio-Visual Association, Inc., Copyright Law Revision Part 4 at 397, and was included in the 1964 bill. The Authors League of America, Inc. took strong exception to this approach arguing that authors "do not

that that work product be the exclusive product of the commissioner or the orderer, their comptrollers and accountants start going into a real tailspin the minute they start seeing the word "employee," because this means social security, withholding, and all the other attendant mechanical housekeeping tasks." Copyright Law Revision Part 4 at 267.

[8] "[S]ection 26 refers only to works made by salaried employees in the regular course of their employment." Varmer Study at 130.

have the economic bargaining power to resist the inclusion of such a clause in publishing contracts." Copyright Law Revision Part 4 at 313. The Authors League of America, Inc. then went on to hint at a possible compromise by asserting that

> [t]he needs of publishers of truly composite works, such as dictionaries and reference books, can be solved without interfering with the protection of an adequate renewal, or reversion clause, which is so much needed by American authors.

Copyright Law Revision Part 4 at 314.

In an effort to reconcile the differences between authors and publishers, the Copyright Office brokered a compromise between the parties. This compromise was adopted in the proposed 1965 draft copyright bill.[9] Under the compromise, only a limited number of enumerated types of works would be accorded status as a "work made for hire", and then only if the parties expressly agreed in writing that the work would be considered a "work made for hire."[10] The

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[9] Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 66-67 (Comm. Print 1965). ("Copyright Law Revision Part 6")

[10] The definition of the "work made for hire" in the 1965 draft bill reads as follows:

(1) a work prepared by an employee within the scope of his employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

parties testified before Congress in 1965 and clearly set forth the terms of the compromise.[11] The next year, in the first legislative report on the revision, the House Judiciary Committee adopted the compromise. H.R. Rep. No. 2237, 89th Cong., 2d Sess., 114-116 (1966).[12]

The four groups of works enumerated in subsection two of the 1965 draft bill were later expanded to the present nine in section 101 of the 1976 Act. In substance, however, the definition of "work made for hire" and the sharp distinction between works created by employees and works specially ordered or commissioned remained unchanged from 1965 to its inclusion in Section 101 of the 1976 Act.

It was the definition of "employee" as a regular, salaried employee that formed the basis for the compromise on the "work for hire" provisions of the 1976 Act.[13] Moreover, it was this compromise, and hence

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[11] *See*, Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835. Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., 89th Cong., 1st Sess. 107 (1965). *See also*, *Dumas*, slip. op. at 22-23

[12] The language in this report was adopted virtually verbatim in the 1976 House Report. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976).

[13] It is critical to note the relative timing of the compromise worked out between authors and publishers on the "work for hire" issues raised in the 1976 Act and parallel judicial developments in the construction of section 26 of the 1909 Act. Specifically, the compromise between authors and publishers was reached prior to the Court of Appeals for the Second Circuit's decision in *Brattleboro* under the 1909 Act. Thus, at the time that the critical compromise was made in 1965 that led to the

the definition of an "employee" as a regular, salaried employee, that was approved by all interested parties to the revision of the U.S. Copyright Law. The definition of an "employee" as a regular, salaried employee was a pillar upon which the compromise was built and any attempt to undermine it would nullify the compromise.

C. The Evolution of the "Work for Hire" Doctrine Under the 1909 Act After 1966

In December of 1966, the Second Circuit held, for the first time, that the "work for hire" principles of section 26 of the 1909 Act were "applicable when the parties bear the relationship of employer and independent contractor." *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 568 (2d Cir. 1966). After *Brattleboro*, expansion of the "work for hire" doctrine proceeded apace. *See, Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974) ("[The 'work for hire'] doctrine is applicable only when the employee's work is produced at the instance and expense of the employer. . ."); *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978) ("The crucial element in this determination [of whether a work was created by an employee within the scope of employment] appears to be whether the work was created at the employer's insistence and expense. . . Another factor is whether the employer had the *right* to direct and supervise the manner in which the work was being performed."). Given this state of the law under the 1909 Act, the Fifth Circuit more recently observed that the "work for hire" doctrine "developed into an almost irrebuttable presumption that any person who paid another to create a copyrightable work was the statutory 'author' under the 'work for hire doctrine.'" *Easter Seal Society*, 815 F.2d at 327.

definition in the 1976 Act, an "employee" under section 26 of the 1909 Act was understood by all interested parties to mean a regular, salaried employee.

The legislative history of the 1976 Act can only be understood if it is set along side the pre- and post-1966 cases which construed section 26 of the 1909 Act. As indicated above in section I.B., the compromise on the "work for hire" provisions in the 1976 Act was reached in 1965, at a time when the term "employee" under section 26 of the 1909 Act was judicially construed as being a regular, salaried employee. Since the compromise was reached before the *Brattleboro* decision in 1966, the overly expansive judicial construction of the term "employee" under section 26 of the 1909 Act by *Brattleboro* and its progeny is irrelevant to the legislative history of the "work for hire" provisions of the 1976 Act. This is especially true when it is realized that once the compromise was reached in 1965 it was not thereafter reviewed or considered by Congress until passage of the Act. *Dumas*, slip op. at 24, n.14. In that context, it is clear that Congress intended the term "employee", as used in section 101 of the 1976 Act, to mean a regular, salaried employee.

II. THE APPROACH URGED BY CCNV IS UNWORKABLE

In their Brief, Petitioners urge this Court to focus on "actual supervision and control" to determine if one is an "employee" under 17 U.S.C. § 101. Brief for Petitioners, pp. 18-24 and 30-35. This approach was adopted in *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). In *Aldon*, the court, citing *Brattleboro* and the

cases following *Brattleboro*, approved the district court's instruction that an employee working within the scope of his employment under 17 U.S.C. § 101, is "a person acting under the direction and supervision of the hiring author, at the hiring author's instance and expense." *Aldon*, 738 F.2d at 551.

This "actual supervision and control" test is subject to criticism on at least two grounds. First, an "actual supervision and control" test is simply not sufficient to distinguish between independent contractors and employees. This deficiency was recognized by the Fifth Circuit in *Easter Seal Society*:

> "Actual control" or the "right to control" are relevant, but alone they cannot make an otherwise independent contractor into an employee. Conversely, the lack of actual control over the production of a given work—and perhaps even the *right* to control production—will not make an independent contractor out of an employee.

Easter Seal Society, 815 F.2d at 335-336 (footnote omitted).

Apparently, this clearly undesirable result is what drove the Court in *Evans Newton Incorporated v. Chicago Systems Software*, 793 F.2d 889, 894 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986) to hold that the work at issue was a "work for hire", absent any evidence that the "employer" actually controlled the work of the putative "employee". This holding was recognized for what it was by the Fifth Circuit as a gradual

> slide into a "right to control" test, just as in the old "work for hire" doctrine the "right to control" test from agency law gradually slid into an almost absolute (though frequently false) presumption that whoever paid for creation of the work had the "right" to control its production.

Easter Seal Society, 815 F.2d at 334.

We note in this regard that the so-called "literal interpretation" urged by the court below and by the Fifth Circuit in *Easter Seal Society* calls for adoption of the Restatement of Agency[14] to determine if one

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[14] Both the Court below and the Fifth Circuit in *Easter Seal Society* applied section 220 of the Restatement of Agency (second) (1958) which reads as follows:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing

is or is not an "agent" or "employee". As recognized by the Ninth Circuit in *Dumas*, however, "in adopting agency law principles to distinguish employees from independent contractors, the Fifth Circuit indirectly includes the rejected 'supervision and control' test, because agency law considers relevant 'the extent of control which, by the agreement, the master may exercise over the details of the work.' " *Dumas*, slip op. at 35. We agree with *Dumas* in this regard. Further, we agree with *Dumas* that a relationship between parties may be ambiguous, in which case relevant factors may be looked to in order to determine if the relationship is one of regular, salaried employment. *Dumas*, slip op. at 37. In all such cases, however, caution must be exercised to be sure that the indicia do not overshadow the basic inquiry of whether the creator of a work is a regular, salaried employee.[15]

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the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

[15] In this regard we note that the Ninth Circuit stated that "[w]hile the degree of control and input exercised by the buyer may be relevant to an inquiry into joint authorship . . . it will not ordinarily be relevant in determining the status of the artist [as an employee] . . ." *Dumas*, slip op. at 38 (footnote omitted). It was apparently recognized by the court in *Dumas* that looking

Another problem with *Aldon*'s "actual control" test is its superimposition of an additional inquiry, not mandated by the language of section 101, which adds complexity and uncertainty to the Act. Rather than simply making a reasoned, prospective judgment whether an individual is a regular, salaried employee, and thus a section 101 "employee", one must look to the nature and extent of the contributions made to the work. Thus, under *Aldon*, which is the approach urged by CCNV, one must examine each work after it is completed and judge whether the commissioning party exercised the requisite degree of control to be considered an employer under sections 101 and 201 of the 1976 Act. Increased litigation seems likely because there is no objective standard of control which can be looked to by the parties or by the bar to determine the degree of control required to establish an employer/employee relationship under the 1976 Act.

If, however, one first determines whether the person creating a work is a regular, salaried employee, all works created by that individual as an employee within the scope of employment are "works made for hire." If the person is not an employee, or if there is doubt, a contract can be negotiated to prospectively establish ownership of copyright.[16]

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to "right to control" or "actual control" as indicia of a "regular, salaried employee" would dilute the clear definition of a section 101 "employee" as a "regular, salaried employee", obfuscate the clear differentiation between the first and second subdivisions of the section 101 definition of "work made for hire", and ultimately subvert the compromise worked out by the interested parties and endorsed by Congress.

[16] Ownership is, of course, transferable under 17 U.S.C. §

This result has the singular benefit of being consistent with the literal meaning of 17 U.S.C. §§ 101 and 201, being consistent with the legislative history of 17 U.S.C. §§ 101 and 201, and producing a construction of 17 U.S.C. §§ 101 and 201 that is fair, workable and predictable.

Turning to the case at bar, Reid was not an employee of CCNV within the meaning of the section 101 definition of "work made for hire" because he was not a regular, salaried employee. Reid's status as an independent contractor is evidenced by: (1) the length of his employment was short - spanning from October, 1985 to December 24, 1985. *Community for Creative Non-Violence*, 846 F.2d at 1487-1488; (2) payment was not on a salary basis but was, rather, by the job for a fixed sum of $15,000. *Id.*, at 1487; and (3) Reid had not done work for CCNV before or after the sculpting of "Third World America."

We submit, therefore, that Reid's work was a commissioned work under any meaning of that term. Petitioners attempt to characterize a clearly commissioned work as the work of an "employee" is an attempt to create a remedy to conform to a desired result. The result Petitioners desire is utterly destructive of the careful compromise on the "work for hire" provisions of the 1976 Act negotiated by the interested parties and endorsed by Congress. That com-

201(d). We submit that this is the fairest result in that it places "the burden of contracting, i.e., deviating by contract from the statutory rule, . . . on the shoulders of the party who is ordinarily in a better position to carry this burden. This party would seem to be the employer, by reason of his stronger bargaining position and more convenient recourse to expert legal advice." Varmer Study at 140.

promise should not be upset merely because CCNV failed to take the steps necessary to obtain the rights to the work "Third World America" it now claims it needs.

CONCLUSION

We urge this Court to hold that the 17 U.S.C. § 101 definition of "work made for hire" establishes a clear division between its first and second subsections whereby the first subsection applies only to regular, salaried employee and the second subsection applies only to the enumerated categories of specially commissioned works and only if the parties agree in writing that the work is to be considered a work made for hire.

This result is consistent with the legislative history and produces a result that was agreed to by the interested parties during drafting of the 1976 Act and which is fair and workable.

Respectfully submitted.

Arthur J. Levine
Richard C. Wilder
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER
1775 K Street, N.W.
Washington, D.C. 20006
(202) 293-6850

William L. LaFuze
VINSON & ELKINS
2900 First City Tower
Houston, Texas 77002
(713) 651-2595

Attorneys for *Amicus Curiae*:
American Intellectual
Property Law Association
2001 Jefferson Davis Highway
Arlington, Virginia 22202